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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWRENCE LAMOND PHILLIPS,

Defendant and Appellant.

In re

LAWRENCE LAMOND PHILLIPS,

on

Habeas Corpus.

B200624

(Los Angeles County
Super. Ct. No. SA039108)

B209824

APPEAL from orders of the Superior Court of Los Angeles County,

Bernard J. Kamins, Judge. Affirmed.

PETITION for writ of habeas corpus. Writ denied.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant,
Appellant and Petitioner.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General,
Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff
and Respondent.

Lawrence Lamond Phillips appeals from the trial court's orders denying his motion to vacate the judgment and denying his petition for writ of error *coram nobis*. He concurrently seeks a writ of habeas corpus. We conclude, because Phillips knowingly and voluntarily entered his plea, the trial court properly denied his motions to vacate the judgment and petition for writ of error *coram nobis* and, accordingly, we affirm the trial court's orders. In addition, since Phillips has failed to show that his plea was involuntary, we deny the petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

At the June 13, 2000 preliminary hearing in case No. SA039108, Bousifa Saysankgkhi testified that during the month of May 2000, she was living with Phillips in Beverly Hills. On the evening of May 26, Saysankgkhi and Phillips had an argument. Phillips asked Saysankgkhi about telephone numbers she had in a notebook then did not believe her when she told him who they were for. Phillips threw Saysankgkhi's clothes and the contents of her purse and wallet onto the floor and poured bleach, alcohol and nail polish remover on them. The argument then became physical. Phillips pushed Saysankgkhi, injuring her shoulder. At one point, Phillips grabbed Saysankgkhi and pushed her back against some boxes, causing her to hit her head a number of times. After calling her names and swearing at her, Phillips slapped Saysankgkhi, put his hands around her neck, pushed her down on the couch and choked her until she lost consciousness for a moment.

During the argument, which lasted for approximately 45 minutes, Phillips told Saysankgkhi, “ ‘You’re lucky I’m going to Canada or I’d strangle you to death.’ ” He then told Saysankgkhi, “ ‘If you’re going to call the police, I’m going to make sure I get you because I’m going to jail, and I’m going to make sure I get you.’ ” On four different occasions, Saysankgkhi attempted to leave the apartment, only to be pulled back by Phillips. Finally, as Phillips walked toward the bedroom, Saysankgkhi ran from the apartment to the Four Seasons Hotel across the street. A hotel employee telephoned police.

As a result of the altercation, Saysankgkhi had “scrapes on [her] left shoulder,” bruises and “fingernail marks” on her lower neck, and bruise marks on her left chest.

When police searched Phillips’s car, they found articles of clothing with bleach stains, torn paper and a loaded .38 revolver.

2. *Procedural history.*

a. *The plea.*

Following a preliminary hearing, on June 27, 2000 Phillips was charged by information with inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)),¹ making terrorist threats (§ 422), having a concealed firearm in his vehicle (§ 12025, subd. (a)(1)), carrying a loaded firearm on his person (§ 12031, subd. (a)(1)), dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)), vandalism of under

¹ All further statutory references are to the Penal Code unless otherwise indicated.

\$400 worth of goods (§ 594, subd. (a)) and false imprisonment with violence (§ 236).²

Bail was set at \$130,000 and bail bond No. CSU-00258712 was executed for Phillips's release. Trial was set to begin on December 12, 2000. Prior to that time, the parties had engaged in plea negotiations and apparently were close to an agreement. However, neither Phillips nor his privately retained counsel, Eric Bates, appeared on December 12. As a result, Phillips bail was forfeited and a bench warrant was issued for his arrest.

Phillips had believed he was to appear on December 12, 2000. However, his counsel, during a telephone conversation held on December 10 or 11, had advised him that December 12 was not the date set for trial to begin. According to counsel, Phillips was to appear on December 18, 2000. Phillips learned of the error when a friend contacted him and informed him that ESPN News was reporting that, because Phillips had failed to appear, a warrant had been issued for his arrest. Phillips, who was living in Las Vegas, Nevada where he was training for the XFL Football League, then went to the Las Vegas Police Department. As they had no outstanding warrant for his arrest, Phillips got on a plane, returned to Los Angeles and surrendered to the court on the morning of December 13. Phillips's counsel arrived at the courthouse a short time later.

²

Making terrorist threats in violation of section 422 and dissuading a witness from reporting a crime in violation of section 136.1, subdivision (b)(1) are "strike" offenses for purposes of the "Three Strikes" law. (§ 667, subd. (d)(1), § 667.5, subd. (c)(20), § 1192.7, subd. (c)(38).)

At the December 13, 2000, proceedings, the trial court noted that December 12 had been designated as the “trial date, zero of ten for trial. [The trial court] was open [and] ready, if the case could have started.” The trial court continued, “What happens, he didn’t show up for trial, not for some motions or other matters; and I – you know, I know the case. I know what day I set it. The problem when you don’t show up for trial, it starts the 60 days over again. It is a way to delay your case. Just don’t show up. Your case ends up starting from scratch again.” Defense counsel then interjected, “I don’t mean to interrupt the Court. I understand, your Honor. In this situation I believe we are going to resolve this, and we are agreeable. The People are agreeable.” The trial court indicated that any agreement must be approved by the court, then asked the prosecutor for his position on the matter. The prosecutor responded, “Actually, your Honor, just a couple of points. First of all, I did have an opportunity to speak to counsel. It does look like we are the closest we have ever been in terms of disposition. The only issue that seems to be pending between us is surrender date, and the sentence, I think that we are agreeable on. It is just a matter of when the time will be done.” The trial court then inquired, “Where are you – I haven’t interfered. I have left it up to both of you rather than typical hands-on. [¶] [Where] are you in negotiations on here?”

The following then occurred: “[The prosecutor]: Basically, I conveyed at the last hearing it was a one-year County Jail offer. I haven’t specified what count it would be, but it would be to one of the counts – one of the felony counts. [¶] The Court: Strikes? [¶] [The prosecutor]: Yes. [¶] The Court: Two of them are strikes. [¶] [The prosecutor]: That’s correct. [¶] . . . [¶] [The prosecutor]: The time, though, I had

offered a year. I told counsel that I would resolve it for 180 days. I have to get approval about the surrender dates. It is my understanding that Mr. Phillips, due to an engagement – the work engagement [playing football], won't be able to do time until April, so I need . . . to make sure that is okay with my office. [¶] The Court: How about me? I don't think that is okay with me."

After the prosecutor indicated she was "prepared to go forward," the trial court expressed its doubts about allowing Phillips to serve his 180 days in county jail in April. The trial court indicated it would "go [to] February," but that it wanted to dispose of the case that day. The court continued: "If we aren't, it is going to be zero of 60 that – the defendant has to start from the beginning by posting bail. If it is disposed of, I have the better hammer over his head if he [doesn't] show up. I have an open year. If you want to dispose of it for that, I will approve it. If not, set it. I will set it in 50 of 60, which will be sometime in February." Defense counsel addressed the court, indicating he had two concerns. One was the bench warrant, which the trial court indicated it would recall. The second was whether the court was going to require Phillips to post bond again were he to be remanded into custody. The trial court indicated it would require Phillips to post bond. The court stated: "He has missed [his] trial date. It is not – the bail was forfeited. What I will do here now, so that even though he has come a whole day late, the bench warrant is recalled. The bail forfeiture of 12-12 is set aside. Bond is exonerated. Now he is off the hook on the bond. . . . [¶] . . . [¶] [Should he be remanded,] I will set new bail. If it is resolved, I have a bigger hammer than any bail for him to show up on. [¶] Why don't you take a moment to chat with [the prosecutor]

on what count. If not, I will set it for trial. The case has been messed around with too long.”

The following then occurred: “[Defense counsel Bates]: Is the Court going to not let me try to resolve it? [¶] The Court: No. [¶] [Defense counsel Bates]: Can we attempt to settle? [¶] The Court: I will take the time. I have to sign a warrant on a homicide case. I don’t mind if you want to sit and chat with [the prosecutor]. Mr. Phillips shouldn’t be going anywhere. [¶] . . . [¶] . . . You chat with her. I left it up to the both of you. Let’s hear from the two officers while you chat.”

After signing the warrant, the trial court inquired of Bates and the prosecutor, “What’s the situation, Counsel?” Bates replied, “Your Honor, there will be a change of plea at this time.” The trial court then stated: “I have had a conference at the bench [with] both counsel. The Court would normally, after a plea, never put a case over four months for actual sentencing. There are some extenuating circumstances over the vigorous objection of the prosecutor, so I will make her unhappy, and I am sure Mr. Phillips isn’t too happy. I must be doing it fairly. [¶] You are going to be entering a plea apparently?”

It was determined Phillips would plead guilty to the first two counts: inflicting corporal injury upon a cohabitant, a felony, and making criminal threats, a “strike.” In exchange for his plea, Phillips would be granted probation on the condition he serve 180 days in county jail, the time of service to begin in April 2001 to enable Phillips to continue training with the XFL Football League. The trial court advised Phillips of his right to a jury or court trial, his right to confront and cross-examine the witnesses

against him, and his privilege against self-incrimination. Phillips indicated that he understood and agreed to waive the rights. The trial court informed Phillips that one of the charges to which he was pleading guilty, making criminal threats in violation of section 422, amounted to a serious or violent felony within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Accordingly, Phillips's plea to the offense would subject him to the terms of that law should he become involved in another criminal matter. The trial court explained: "You know, baseball, three strikes, you are out. Third strike, you could get life in prison. It is really up to you, if you get in any more troubles or problems with the law. It is in your court now, whether or not you violate the law again. You won't have to violate the one strike if you don't get in trouble again. [¶] If you do, what happens with [the] one strike, if you get another felony, any penalty you get has to be prison. It has to be doubled. If it is two years, it would have to be four years. It would have to be at 80 percent time, so the major effect of taking the strike, strike one, is that any future penalty is doubled."

After the trial court informed Phillips of further consequences of his plea, including the maximum penalty which could be imposed should he violate probation and various fines he would be required to pay, Phillips pled no contest to inflicting corporal injury upon a cohabitant and making criminal threats. Counsel joined in the pleas pursuant to *People v. West* (1970) 3 Cal.3d 595, 604-608, indicating he believed it was in Phillips's "best interest[] at [the] time to accept the plea." The trial court did not ask Phillips whether he was freely and voluntarily entering the plea and did not find that

there was a factual basis for the plea. (§ 1192.5.)³ After taking the plea, the trial court commented: “If I sentence him now, we won’t have to worry about any bail issue. He will be on probation. He doesn’t have to worry about going to a bondsman again. He is on probation to me. [¶] I will stay the [jail] time to April. I have agreed to do that. I will stay the beginning of anger management [classes].” The trial court then sentenced Phillips to three years formal probation, one condition of which was to serve 180 days in county jail beginning on April 26, 2001. Neither Bates nor the trial court informed Phillips that he had the right to contest the validity of his plea by way of a motion to withdraw the plea or by writ petition.

Phillips surrendered to the court and was taken into custody on the morning of April 26, 2001. Following service of his time in custody, Phillips violated the terms of his probation on a number of occasions. Probation was revoked, then reinstated numerous times.

- b. *The motion to withdraw the plea, vacate the judgment and for a writ of error coram nobis.*

On April 9, 2007, Phillips, who was then being represented by counsel from the Public Defender Department, made motions to withdraw his plea and vacate the judgment in case No. SA039108. In the alternative, he petitioned for a writ of error *coram nobis*. Counsel asserted Phillips’s plea in the matter had not been knowing,

³ Section 1192.5 requires that the trial court “cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.”

intelligent or voluntary because it was entered as a result of unlawful coercion and in violation of section 1192.5. Further, defense counsel had not been provided with certain statements made by the victim of the crimes which would have been reasonably likely to have materially affected the outcome in the case.

Counsel first noted the trial court had stated that, should the victim in case No. SA039108 fail to appear for trial, as she had for the three prior proceedings, the prosecution could simply rely on her preliminary hearing testimony. Counsel asserted this statement by the trial court created the erroneous impression that the prosecution automatically had the right to use that evidence against Phillips were he to take the matter to trial.

Counsel next argued the trial court's statement that, should Phillips wish to be released pending trial, he would be required to "start from the beginning by [again] posting bail[,]” was coercive. According to counsel, Phillips did not have the financial resources to again post bail. Counsel asserted that Phillips knew only too well that it would be impossible for him to post bail again, as the court made clear he would be required to do if he wanted to go to trial, but remain free of custody. Counsel submitted that the record regarding when the original bond was ultimately posted in case No. SA039108 clearly confirmed Phillips's position. According to documents counsel obtained from Aladdin Bail Bonds and from the court file, the bond written on behalf of Mr. Phillips, Bond No. CSU-00268712, had been executed on June 21, 2000 and filed with the court on June 28, 2000. A premium of \$13,000 in cash was required for this bond. This requisite \$13,000 in cash was provided on June 21, 2000 by

a payment of \$6,500 from Mitch Frankel, President of Impact Sports, and a second payment of \$6,500 provided by a friend of Phillips's, Daphne D. Clayton.

A hearing was held on the motion on April 9, 10, 23 and 24, 2007. At that proceeding, Mitchell Frankel, the president of Impact Sports and Entertainment Management Company, testified that his company had in the past represented Phillips with regard to his career in football. In June of 2000, Frankel was contacted by one of Phillips's relatives regarding the posting of a bail bond so that Phillips could be released from custody pending resolution of a criminal matter he was involved in. It was Frankel's understanding that neither Phillips nor members of his family had the financial resources to post the bond. In December of 2000, Phillips's financial situation had not improved. According to Frankel, Phillips "was in a bad financial situation at that time. He probably had very little or no money, and given his past and what he had earned over the years prior, we were very privy to that. So my understanding of his situation, he was trying to play ball, get back to playing ball to make some money to live and go on with his life."

Eric Bates testified that he had acted as Phillips's counsel for purposes of the proceedings held from June to December of 2000. It was Bates's recollection that the proceedings held on December 13, 2000, the day Phillips entered his plea, were "more pressured" than previous court appearances had been. On December 13, Bates was "upset that [his] client had to do something that he and [Bates] felt was not necessary to be done at the time[;]" i.e., enter a plea of no contest to two of the felony charges, including one "strike." Bates indicated that "Phillips was there in that situation of it

being after his scheduled court date because of [his, Bates's,] miscalendar[ing].

[¶] . . . [¶] . . . [I]t wasn't a situation that Mr. Phillips created."

Bates was of the opinion that the atmosphere in the courtroom on December 13, 2000 "was the most pressured, coercive situation [he had] ever been in." Bates continued, "[T]he problem was here this was a situation that was going forward in a negative way for Mr. Phillips because of his attorney and not because of him. I did not believe the court truly appreciated that and required us to resolve the case right then and there one way or another." Bates explained that he had attempted to inform the court that the mistake regarding the date had been his, not Phillips's. Bates stated: "I was trying to let the court know that it was not a situation where Mr. Phillips was trying to ignore his appearance in court. That he did more than most of my clients would have ever done once they found out a problem had occurred. That on his own he came down from out of state [¶] So[,] in my mind, he did everything he should have It was my fault for him not being here on his scheduled court date, and I was shocked that it was not being received [by the trial court]." Bates was aware of Phillips's financial situation. Although he had initially agreed to represent Phillips for a fee, when Bates discovered Phillips did not have the money to pay him, he continued to represent Phillips without pay because he "felt it was the right thing to do."

From the trial court's comments, Bates understood that, unless the parties could resolve the matter within just a few moments, Phillips would be remanded and the matter would be set for trial sometime in February of 2001. Since he did not have the financial ability to again post bond, Phillips would lose the job with the XFL Football

League. During the proceedings, Phillips was “clearly upset, agitated, angry, confused [and] very, very animated.” Finally, Bates indicated that, prior to the December 13, 2000 proceedings, he and the prosecutor had engaged in negotiations regarding a plea agreement. Bates stated that he had been willing to allow Phillips to plead to one of the alleged felonies, as long as it was not a “strike.”

Phillips testified that, following his arrest in May 2000, he had not had the money to post bail. Phillips’s financial situation had not improved by December of 2000 and he, again, did not have sufficient funds to post bail. In December 2000, Phillips was living in Las Vegas, Nevada, and playing football for the Las Vegas Outlaws of the XFL Football League. On December 10 or 11, Phillips contacted his counsel at the time, Eric Bates, to find out what would be occurring at the December 12 hearing. Bates informed Phillips that the court date was not for December 12, but was scheduled for December 18.

When Phillips discovered that he was scheduled to be in court on December 12, he flew from Las Vegas to Los Angeles and reported to the courtroom on the morning of December 13. His counsel, Bates, arrived a short time later. After watching the interaction between Bates and the trial court, Phillips had the feeling the proceedings were not going the way counsel had planned. Phillips understood that, unless the case was resolved within the next several minutes, he was to be remanded into custody.⁴

⁴ When asked if there was “ever any time where [his] lawyer told [him] if [he] didn’t accept a disposition that [he] [was] to be remanded into custody,” Phillips responded, “Yeah. Well, I remember him saying when he came to tell me what the deal

Phillips was upset because he was unable to again post bond and, were he to be remanded, he would lose his job with the XFL.

At the time he entered the plea, Phillips did not know what the “legal requirements” were for convictions of making criminal threats and infliction of corporal injury on a spouse or cohabitant. Phillips felt “nervous” and “upset” at having to make a decision regarding whether to enter a plea to the offenses after such short notice. When asked whether the fact that his “bail had been forfeited and [he was] faced with going into custody for two months versus being released to go right then and there . . . back to Las Vegas to play football was . . . a factor in the decision that [he] made[,]” Phillips responded, “Yes. It was the whole decision.”

At proceedings held on April 24, 2007, the trial court indicated it wished the parties to address the “possible belated turning over to the defense a report from the alleged victim saying that . . . she wanted to renege or drop the charges.” The court noted that the victim had stated: “ ‘Everything I said at the prelim[,] that was all true, but, you know, I don’t want to prosecute him and he did ask me to leave.’ ” The victim apparently believed that if she had left the house when Phillips had initially asked her to, the entire altercation would have been avoided. The trial court stated it wished to

was, and I remember him saying that I got [to] make a decision right – well, I was like, ‘What’s going to happen if I don’t take this deal?’ He was like, ‘You’re going into custody.’ I was like, ‘I got to make that decision right now?’ He’s like, ‘Yeah, you got to make it right now.’ I was like, ‘So he’s not going to let – he’s not just – I don’t know if I knew the reinstate [*sic*] but, ‘He’s not going to let me go back out on bond?’ and he was like, ‘No. I don’t think you can post another bond.’ I remember him staying [*sic*] something, ‘I don’t have no money for no bond,’ and I remember just going back [to] Mr. Bates . . . telling me I had to make a decision right then.”

hear argument regarding whether the material was simply “superfluous” or was exculpatory and should have been turned over to the defense pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). The court stated: “Almost every single domestic violence case I get and I get a lot of them . . . , 90 percent of the victims want to renege so it’s the usual rather than the exception. So it may or may not be *Brady* material at all.”

Counsel for Phillips asserted that, because the prosecution had failed to provide defense counsel with a statement by the victim in which the victim “was acknowledging that she was not completely truthful at the prelim, [defense counsel] would have [had] no way to [] assess” either the victim’s testimony or her testimony at the preliminary hearing, should that have been read into evidence at trial. Counsel indicated that the victim had made the statement to the prosecutor on September 21, 2000, a date well before the date of the December 13 plea.⁵

The prosecutor argued that the “material that counsel [was] talking about [was] not exculpatory according to *Brady* [and was] not material that would have led to a different result should it have been divulged to the defense or if the court had known

⁵ On February 12, 2001, two months after Phillips entered the plea, the victim, Saysangkhy, wrote a letter to the trial court indicating that, at the time of the incident which led to the charges against Phillips, he was preparing to go to Canada to play football and had made it known that he did not want Saysangkhy to go with him. Saysangkhy became upset and, during the argument with Phillips, she “somehow went to the kitchen and picked up a small carving-type knife and threw it at him.” She further stated that she did not want Phillips to have to go to jail because he had wanted her to leave. She wanted to drop the charges soon after she filed them, but later “found out that it no longer was in [her] hands.”

about it.” The prosecutor continued: “As the court has said, it’s not uncommon for victims in cases just like this one to basically have some reservations about coming forward to testify What did not happen in the case . . . is a recantation of the victim of what happened. She’s . . . saying to the court that everything I said in the preliminary hearing and everything that you’ve seen in the police report was, in fact, true. Those things did happen. My only reservation is about my feelings towards Mr. Phillips”

The trial court determined the victim’s statement did not amount to exculpatory “*Brady* material.” However, the trial court expressed concern that, although the victim’s statement was made in 2000, no one had made a motion to set aside the plea at that time. The court stated: “What [Phillips has] done is wait until he’s had 45 court appearances. I counted them[,] dealing with probation violations and other matters, to make 45 appearances to then make a motion to set aside the plea that he made in December of 2000.”

The trial court denied Phillips’s motion to vacate or withdraw his plea and declined to issue a writ of error *coram nobis*. Although the court indicated it was a “close[] case,”⁶ it found Phillips’s plea had been knowingly and intelligently made. The court commented: “[T]he real issue is whether the defendant faced enough

⁶ The reporter’s transcript of the proceeding indicates the trial court stated the case was “closed” rather than “close.” However, in her petition, counsel for Phillips indicates she discussed this discrepancy with the district attorney who represented the real party in interest during the proceedings. Counsel states the district attorney “agrees and stipulates that at this point in the proceeding the court stated that this was a ‘close’ case, did not state that this was a ‘closed’ case and that the transcript of the proceedings which reports the word ‘closed’ is in error.” (Underlining in original.)

coercion because of the financial situation and job situation to enter his plea without being . . . mentally free at the time, without any reservation. When you enter a plea it has to be knowingly and intelligently made. That's the standard So was it knowingly? Yes. Was it intelligently made? Luckily, I heard this defendant finally and I felt he was highly intelligent. I was quite pleasantly surprised by his ability to grasp every question [and] make a response. You could tell he's a college graduate or [at] least that level. So I felt that he knowingly and intelligently made a plea."

DISCUSSION

1. *Petition for writ of error coram nobis.*

"[A] motion to vacate the judgment is recognized as equivalent to a petition for the common law remedy of a writ of error *coram nobis*." (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618; *People v. Totari* (2003) 111 Cal.App.4th 1202, 1206.)

"A writ of error *coram nobis* may be granted when three requirements are met: (1) the petitioner has shown that some fact existed which, without fault of his own, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of judgment; (2) the petitioner has shown that the newly discovered evidence does not go to the merits of the issues tried; and (3) the petitioner has shown that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. [Citations.]" (*People v. Castaneda, supra*, 37 Cal.App.4th at pp. 1618-1619; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 987.)

“ ‘A petition for writ of error *coram nobis* places the burden of proof to overcome the strong presumption in favor of the validity of the judgment on the petitioner. This burden requires the production of strong and convincing evidence. A mere naked allegation that a constitutional right has been invaded will not suffice. The application should make a full disclosure of the specific facts relied upon and not merely state conclusions as to the nature and effect of such facts. [Citation.]’ [Citations.]” (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 548-549.)

“Moreover, . . . in a *coram nobis* proceeding, a defendant must show prejudice. He must establish that he would not have entered the plea had he been aware of the true facts.” (*People v. Castaneda, supra*, 37 Cal.App.4th at p. 1622.) The granting or denial of a writ of error *coram nobis* is reviewed for abuse of discretion. (*People v. McElwee* (2005) 128 Cal.App.4th 1348, 1352; *People v. Ibanez, supra*, at p. 544.)

In the present case, Phillips first contends the “trial court abused his discretion in finding appellant’s plea, made under threat of immediate jail, was valid.” He asserts, although he intended to enter a plea, he did not intend to plead to a “strike.” This mistake of fact made his plea involuntary. The contention is without merit.

“ ‘ “[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).” ’ ” (*Brady v. United States*

(1970) 397 U.S. 742, 755.) “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” (*Hill v. Lockhart* (1985) 474 U.S. 52, 56.) Here, a review of the record indicates that Phillips knowingly and voluntarily entered his plea. He understood his choices. That he was facing incarceration if he decided not to enter a plea is not dispositive. (*Brady v. United States, supra*, at p. 755 [“[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty”].) Moreover, he was well aware of the fact he was pleading to a “strike.” Prior to entry of the plea, the prosecutor indicated that the felony pled to could be a strike and during the taking of the plea the trial court went to great lengths to explain to Phillips the consequences of pleading to a “strike” offense.

Although Phillips was given only a few moments to decide whether to enter a plea rather than go to trial, it can be inferred from his comments that he voluntarily chose to enter the plea. As noted above, when asked whether the fact that his “bail had been forfeited and [he was] faced with going into custody for two months versus being released to go right then and there . . . back to Las Vegas to play football was . . . a factor in the decision that [he] made[,]” Phillips responded, “Yes. It was the whole decision.” Phillips voluntarily entered a plea, the terms of which he was fully aware, so that he could return to Las Vegas as soon as possible. This was not a situation where there was “substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state.” (*People v. Gilbert* (1944) 25 Cal.2d 422, 443.)

Phillips asserts, because the trial court immediately imposed sentence after the plea was taken, he was deprived of the remedy provided by section 1018. That section provides in relevant part: “On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.” Although the section is to be liberally construed to promote justice, “[t]o withdraw a guilty plea, a defendant must show, by clear and convincing evidence, good cause. [Citations.]” (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1142.) There is, however, no evidence in the record indicating that, at the time he entered the plea, or shortly thereafter, Phillips wished to withdraw it. (See *People v. Castaneda*, *supra*, 37 Cal.App.4th at p. 1622 [In a *coram nobis* proceeding one must “establish that he would not have entered the plea had he been aware of the true facts”].) The facts, as presented by the present record, indicate that by entering the plea, Phillips was granted probation, allowed to immediately return to Las Vegas and to postpone the service of his 180 days in jail until the end of the football season.

Phillips next contends “[t]he trial court abused [its] discretion in finding [his] plea, made without disclosure of *Brady* ^[7] evidence, was valid.” On September 21, 2000, the prosecutor and an investigator interviewed the victim of the alleged crimes,

⁷ *Brady*, *supra*, 373 U.S. 83.

Bousifa Saysankgkhi. Saysankgkhi had previously contacted the prosecutor and suggested that the charges against Phillips be dropped. During the interview, however, she stated that “the incident [occurred] just as she had initially reported” and that it “ ‘wasn’t okay what [Phillips] did.’ ” However, since the incident the two had reconciled and Saysankgkhi just wanted to “ ‘get it over with, not deal with it, [and] put it in the past.’ ” Phillips claims that, had his counsel known this, he would have been in a position to negotiate a more beneficial plea bargain. While this may be so, this “error” cannot be said to have prevented the rendition of judgment. This is particularly true since the trial court noted that in many domestic violence cases the victims either recant or refuse to testify against the perpetrator.

Phillips has also failed to show that the “newly discovered evidence” could not, in the exercise of due diligence, have been discovered by him at anytime substantially earlier than the time of his petition for the writ. Phillips entered the plea on December 13, 2000. He did not file his motion to vacate the judgment and petition for writ of error *coram nobis* until 2007. Phillips claims that, during that time, he was never advised that he had the right to challenge the plea.

“A postjudgment motion to change [or withdraw] a plea must be ‘seasonably made.’ [Citation.] Thus, the trial court may properly consider the defendant’s delay in making his application, and if ‘considerable time’ has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay. [Citation.] The reason for requiring due diligence is obvious. Substantial prejudice to the People may result if the case must proceed to trial after

a long delay. For example, in *People v. Palmer* (1942) 49 Cal.App.2d 567, the defendant pled guilty, then fled and was apprehended 12 years later. In affirming the denial of his postjudgment motion to withdraw his plea the appellate court held that it would be a mockery of justice to permit the defendant to change his plea after 12 years, after material witnesses may have died or disappeared. [Citations.] [¶] In [*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618], defendant waited seven years to seek relief. He offered no justification for the delay. The trial court acted well within the bounds of its discretion to deny relief on that ground alone.” (*People v. Castaneda, supra*, 37 Cal.App.4th at p. 1618.)

As with a motion to vacate a plea, a petitioner who seeks to set aside a judgment by means of a writ of error *coram nobis* “must allege the time and circumstances under which the new facts were discovered in order to demonstrate that he has proceeded with due diligence.” (*People v. Castaneda, supra*, 37 Cal.App.4th. at p. 1619.) In the present case, Phillips made no showing of reasonable diligence. According to the trial court he made 45 court appearances between entry of his plea and his petition for writ of error *coram nobis*. At none of these proceedings did he indicate that his plea had been entered under duress and inquire whether it could be set aside or vacated. Instead, he waited seven years to seek relief and his only justification is ignorance. “The trial court acted well within the bounds of its discretion to deny relief on that ground alone.” (*Id.* at p. 1618; see *People v. Shorts* (1948) 32 Cal.2d 502, 513 [“One who applies for a writ of *coram nobis* . . . such as the one here presented must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have

been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.”]; *People v. Carty* (2003) 110 Cal.App.4th 1518, 1529.)

2. *Petition for writ of habeas corpus.*

In his petition for writ of habeas corpus, Phillips asserts “that his plea was involuntary, . . . because it was made under mental duress and without disclosure of *Brady* evidence. [Phillips] also argues that his trial counsel provided ineffective assistance by failing to take any steps to withdraw the plea, vacate the judgment, appeal the conviction or inform [Phillips] of these options, first when faced with [Phillips’s] involuntary plea, and second when provided with newly-discovered exonerating evidence two months later.”

“To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel’s performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.]” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

“Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that, ‘ “ ‘but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” ’ ” (*Ibid.*)

With regard to his claim his plea was involuntary, we have, in the above discussion regarding his petition for writ of error *coram nobis*, determined that Phillips knowingly, intelligently and voluntarily entered the plea.

As to Phillips’s claim his counsel was deficient for failing to take any steps to withdraw the plea, vacate the judgment, appeal the conviction or inform Phillips of these options when provided with newly-discovered exonerating evidence two months after Phillips entered his plea, “the record affords no basis for concluding that counsel’s omission[s] [were] not based on an informed tactical choice.” (*People v. Anderson, supra*, 25 Cal.4th at p. 569.) Phillips had been charged with seven counts. He pled to only two. Although one was a “strike,” Phillips was nevertheless granted probation, allowed to return to Las Vegas to play football and to serve his 180 days in county jail after the season had ended. It is entirely possible that counsel believed that, were Phillips to make a successful motion to withdraw the plea, he would not get a better disposition the second time around.

DISPOSITION

The trial court’s orders denying Phillips’s motion to vacate his plea and petition for writ of error *coram nobis* are affirmed.

The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.